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Supreme Court of the United States

October Term, 1973
No. 73-1852

MAURICE M. SAYRE,
Trustee in Bankruptcy of The Liberty Mortgage Corporation,
Petitioner,

vs.

THE CITY OF CLEVELAND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals is now reported at 493 F.2d 64 (6th Cir. 1974) (Petitioner's Appendix A50-62). The 1972 opinion of the District Court is not reported (A35-46). Thereafter, the 1972 opinion was supplemented and modified by an unreported opinion (A47-49). The 1967 opinion of the District Court reported in 282 F. Supp. 175 and reproduced in the Petitioner's Appendix (A1-34) is of pertinence here only insofar as it provides background for the issue decided below.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition.

QUESTION PRESENTED FOR REVIEW

Petitioner's two questions are really one. They overstate the holding of the Court of Appeals. The second so-called question tautologically assumes the answer to the question posed, that is—that a "de facto" taking has occurred. Properly stated, the question presented is:

> Absent physical invasion, do the fifth and fourteenth amendments to the United States Constitution require a city to pay for a decline in the market values of numerous parcels of real property located within the boundaries of a general neighborhood planning area and an urban renewal project area when the undisputed facts show that the city has never designated such properties for acquisition as part of the urban renewal project and has never taken any step, as required by state law, to commence eminent domain proceedings against such properties?

The Court of Appeals answered this question "No". Respondent submits that the answer of the Court of Appeals is correct and should not be reviewed.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are set out in the Petition.

COUNTER STATEMENT OF THE CASE

In the early 1960's Council of the City of Cleveland approved a preliminary plan for proposed urban renewal activities designated "University-Euclid General Neighborhood Renewal Plan" ("GNRP"). The area of the GNRP encompassed approximately 1,633 acres of the City's blighted east side. The purpose of the GNRP was to provide "a framework" "to facilitate proper preliminary planning" for "the urban renewal activities proposed for the area involved" (42 U.S.C. §1452(d)). The GNRP itself was a planning device, not an urban renewal project. Within the boundaries of the GNRP, four areas were marked out for possible urban renewal projects.

Only one of those planning areas became an approved, funded and implemented urban renewal project. This was the "University-Euclid Urban Renewal Plan" ("Project I") the area of which was approximately one-half of the area of the preliminary GNRP. In the Project I area, rehabilitation was to be accomplished through a variety of means, including programs stimulating the repair or maintenance of private property by private owners. Less than 10% of the properties in the project area were designated in the Project I plan for acquisition by the City. None of Petitioner's 87 properties involved in the discretionary appeal to the Court of Appeals was included in the Project I plan for public appropriation.

Petitioner filed this action on November 1, 1966 against the Respondent City and the United States.[1] Petitioner's bankrupt, the Liberty Mortgage Corporation, formerly was engaged in the widespread buying and selling

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1. The United States was dismissed by the District Court. Petitioner did not appeal that decision.

of residential properties in Cleveland's blighted east side. The complaint was founded entirely in tort. Respondent moved to dismiss on the grounds of sovereign immunity and lack of diversity. Before the court ruled on the motion, Petitioner filed a "Supplement to Complaint".[2] In Petitioner's briefs filed in opposition to the motion to dismiss, Petitioner informed the court that the supplement was specifically framed to state a claim of a taking of property as such a claim was recognized in the 1964 decision of the Court of Appeals in *Foster v. Herley,* 330 F.2d 87 (6th Cir.). In attempting to articulate a *Foster*-type claim, the supplemental pleading asserted that Respondent had taken "the initial steps in the appropriation of the property" of Petitioner. In his brief elaborating upon the meaning of the supplementary pleading, Petitioner stated that the complaint as amended in effect alleged that the City had taken the steps required by Ohio law to commence eminent domain proceedings (that the City Council had adopted a resolution declaring the intention to appropriate Petitioner's properties and had caused written notices to be issued against those properties). The pleadings in effect alleged that after the City invoked the use of the power of eminent domain against Petitioner's properties, the City stayed the legal processes while it deliberately engaged in extra-legal activities for the purpose of driving down the market price of Petitioner's properties.

At this early stage, the District Court had no evidence before it. In overruling the City's challenge to the sufficiency of Petitioner's pleadings expressly fashioned to fall within the *Foster* doctrine, the District Court construed the broad allegations in Petitioner's favor and ruled that

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2. The original complaint read together with the "Supplement" is styled the "Amended Complaint" in the District Court's 1967 Opinion (Petitioner's Appendix A1).

the amended pleadings stated ". . . a claim of abuse of eminent domain proceedings. . . ." (Petitioner's Appendix A34). In coming to this conclusion, the District Court accepted Petitioner's characterization of this case as a *Foster*-type claim involving the use of the power of eminent domain. *Sayre v. United States,* 282 F. Supp. 175 (N.D. Ohio 1967) (A1-34). Thus, the court observed:

> "The amended complaint states that Cleveland initiated steps to appropriate properties of plaintiff's bankrupt." (A17).
>
> "In the present case eminent domain proceedings involving the properties of plaintiff's bankrupt, though apparently commenced in accordance with law, have never been accomplished." (A18).

After the District Court's order and opinion were issued, Respondent set out to test the "abuse of eminent domain" allegations which permitted Petitioner's claims to survive the motion to dismiss. Respondent propounded a series of interrogatories which, among other things, required Petitioner to specifically identify the properties alleged to have been "taken". Petitioner's answers to the interrogatories were checked against City records. Once this information was collated and analyzed, the stark fact emerged that no eminent domain proceedings involving the properties pertinent to this case had ever been authorized or commenced with regard to the urban renewal project described in Petitioner's pleadings.

The City thus filed a motion for summary judgment. By way of answers to interrogatories, affidavits and documents attached to the motion, the City demonstrated that the use and abuse of the power of eminent domain alleged in the pleadings did not occur. The facts set forth in the

papers filed in support of Respondent's motion were not contradicted. These facts showed that Council did not adopt a resolution determining it necessary to acquire the properties involved in the appeal below. Council did not adopt a resolution declaring its intention to appropriate the properties pertinent to this case. Although Petitioner averred that the City sent notices to it announcing the City's intention to take Petitioner's properties, the answers to interrogatories showed not one such notice was received with respect to the properties involved in this appeal. Finally, the uncontroverted evidence showed that no eminent domain proceedings had ever been authorized or filed against any of Petitioner's properties involved in the appeal to the Court below.

On December 18, 1972, the District Court issued its initial Memorandum and Order in part granting, and in part denying, Respondent's motion for summary judgment (Petitioner's Appendix A35-46).[3] From the District Court's decision adverse to Respondent involving Petitioner's unacquired properties located within the boundaries of the GNRP, Respondent obtained permission to appeal to the Court of Appeals. On March 14, 1974, the Court of Appeals unanimously reversed the District Court, holding that "there is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties." (Petitioner's Appendix A62).

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3. The summary judgment in Respondent's favor involved properties other than those considered in the appeal to the Court of Appeals. Petitioner did not appeal the District Court's judgment in Respondent's favor.

REASONS FOR DENYING THE WRIT

The holding of the Court of Appeals is consonant with the decisions of this Court. No decision of another circuit conflicts with the reasoning or holding below. Those decisions of the highest state courts which have dealt with the subject fully support the decision of the Court of Appeals. Granting certiorari in this case would be inappropriate.

I. The Decision Below Is in Harmony with the Decisions of This Court

Petitioner inaccurately states that "no decision or opinion of this Court" "was cited or relied upon" by the Court of Appeals and that this "Court has never pronounced the rule which the Court of Appeals asserts to be the law" (Petition at 7). To the contrary, the Court of Appeals cited four decisions of this Court in support of its holding (Petitioner's Appendix A61). As is shown below, this Court has consistently held that there is no "taking" of property in violation of the Constitution absent physical invasion or direct restraint on private property.

As early as *Transportation Company v. Chicago*, 99 U.S. 635 (1879), this Court held that governmental activities which do not directly encroach on private property are not a "taking" within the meaning of the fifth amendment even though the consequences of such acts may impair the use of the property.

In *Richards v. Washington Terminal Company*, 233 U.S. 546, 554 (1914) this Court held:

> "Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from

> the legalized nuisance, is held not to be a 'taking' within the constitutional provision."

See also *United States v. Sponenbarger*, 308 U.S. 256 (1939) (adoption of legislation which, if carried out, might result in the flooding of plaintiff's land does not constitute a taking); *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) ("... damage alone gives courts no power to require compensation where there is no actual taking of property"); *United States v. Causby*, 328 U.S. 256, 262 (1946) ("[Taking] would be a definite exercise of complete dominion and control over the surface of the land"); and *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

Petitioner claims that *United States v. Cress*, 243 U.S. 316 (1917) supports its position. It does not. In *Cress*, the federal government had constructed locks and dams on two rivers in Kentucky to improve their navigation. This caused the waters of a non-navigable tributary to periodically flood some lands and to raise the level of another tributary to the extent that the current no longer would operate a mill. After determining under Kentucky law that a riparian owner has a property right in having the water flow past his property without artificial obstruction, this Court held that a destruction of that right and the flooding of lands required the payment of compensation. In coming to this conclusion, this Court carefully distinguished the direct invasion cases from the indirect damage cases, clearly pointing out that indirect damage does not rise to a constitutional claim:

> "These cases have no proper relation to cases such as *Gibson v. United States*, 166 U.S. 269, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; *Scranton v.*

> *Wheeler*, 179 U.S. 141, 153, which likewise had to do with the interruption of access from riparian land to a navigable channel; *Bedford v. United States*, 192 U.S. 217, 225 [etc.]. . . . *In each of these, there was no direct invasion of the lands of the claimants, the damages were altogether consequential, and the right to compensation was denied on that ground.*" 243 U.S. at 327 (Emphasis supplied.)

In cases dealing with the power of eminent domain, this Court has consistently held that governmental acts in planning and preparing for the filing of a condemnation action do not amount to the taking of property within the meaning of the Fifth Amendment. Thus in *Bauman v. Ross*, 167 U.S. 548, 596-598 (1897), this Court held that the legislative adoption of a map marking property for future appropriation did not constitute a "taking" even though the legislation directed that the map be filed of public record. In *Danforth v. United States*, 308 U.S. 271, 286 (1939), this Court held that the enactment of legislation approving and describing a public project and expressly authorizing the condemnation of specifically described property cannot be a taking. This Court thus clearly articulated the rationale applied by the Court of Appeals below:

> "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." 308 U.S. at 285.

If no taking occurred in the above cases where the legislative authority unequivocally expressed an intention to appropriate, with much greater force it follows that no taking occurs where, as here, no preliminary legislative step was ever taken to condemn the properties considered below.

II. There Is No Conflict Between the Decisions of the Courts of Appeals

Petitioner has cited and relied on no decision of any of the Courts of Appeals. Petitioner does not contend that there is any conflict between the circuits. Respondent is aware of none.

Unanimity prevails in the circuits in holding that a *de facto* taking does not occur on facts short of physical invasion or direct legal restraint. *Batten v. United States,* 306 F.2d 580, 584 (10th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963) ("Absent such physical invasion recovery has been uniformly denied"); *Nunnally v. United States,* 239 F.2d 521, 524 (4th Cir. 1956) ("But damages which are the incidental result of lawful governmental action, without any direct invasion of private property . . . do not constitute a taking under the Fifth Amendment"); *United States v. Meyer,* 113 F.2d 387, 398 (7th Cir.), *cert. denied,* 311 U.S. 706 (1940) (". . . mere damage to land not taken is not compensable as an act under the power of eminent domain"). See also *Sharpe v. United States,* 112 F. 893 (3rd Cir. 1902), *aff'd,* 191 U.S. 341 (1903); *Stover v. United States,* 332 F.2d 204 (9th Cir.), *cert. denied,* 379 U.S. 922 (1964); and *United States v. Certain Property Located in the Borough of Manhattan,* 374 F.2d 138 (2d Cir. 1967).

The Court of Appeals for the Sixth Circuit correctly articulated and applied the principle of law followed in the other circuits.

III. The Decision Below Is Fully Supported by Decisions of the Highest State Courts

The highest courts of many states have recently examined the claim that devastating pre-condemnation blight has resulted in the taking of private property without the

payment of compensation. In these cases the state courts have thoroughly considered the fundamental policy issues in order to determine whether precedent is relevant to current urban problems. The decisions of the state courts are in full accord with the decision below.

In *City of Buffalo v. J. W. Clement Company*, 28 N.Y.2d 241, 321 N.Y.S.2d 345 (1971), the Clement property was subject to various official notices, resolutions and ordinances indicating the city's intent to appropriate the property in conjunction with a waterfront redevelopment project. Eminent domain proceedings were not initiated, however, until many years after the city officially informed Clement that it would appropriate its property. In the intervening years, there was a general decline in property values within the redevelopment area. Clement vacated its plant and moved its business. The lower courts concluded that there was a *de facto* "taking" of the Clement property as of April 1, 1963, years prior to the filing of the eminent domain proceedings. The New York Court of Appeals reversed.

In its well-reasoned opinion, the court noted that there are two basic questions raised by the constitutional provisions in effect providing that private property shall not be taken for public use without just compensation. The first question is what is a "taking"; the second is what is "just compensation".

> "There is in fact a marked distinction between those cases which by reason of the cloud of condemnation, resulting in so-called condemnation blight, permit the claimant to establish his true value at the time of the taking but as if it had not been subjected to the debilitating effect of the threat of condemnation (citing cases), and those cases which go even further and

declare that the acts of the condemnor constitute a *de facto* taking long before the filing of the appropriation maps (citing cases). One is the product of acts which result, realistically speaking, in no less than an out and out appropriation of property, requiring in turn that the owner be fully compensated, while the other relates more properly to certain affirmative value-depressing acts on the part of the condemning authority, requiring only that evidence be received of value prior to such acts in an effort to arrive at just compensation." 28 N.Y.2d at 254, 321 N.Y.S.2d at 356.

Thus the court in *Clement* clearly recognized that in the context of *de jure* condemnation proceedings, some courts have resorted to the vocabulary of "taking" in approving a rule of valuation designed to achieve "just compensation".[4] But this looseness in language has not altered the uniformity in result. As the court in *Clement* observed:

"Despite this obvious confusion, it is clear that a *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or legal interference with the owner's

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4. Illustrative are the cases of *Detroit v. Cassese*, 376 Mich. 311, 136 N.W.2d 896 (1965) and *Becos v. Masheter*, 15 Ohio St. 2d 15, 238 N.E.2d 548 (1968). Such cases, as well as the result in *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964) *on remand sub nom., Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968), *plaintiff's motion for clarification of opinion denied*, 423 F.2d 660 (6th Cir. 1970) are fully consistent with the rule of valuation recognized by this Court in *United States v. Miller*, 317 U.S. 369 (1943) and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961) whereby changes in value (whether upward or downward) caused by the project or by the imminence of the condemnation action are excluded from consideration in order to arrive at just compensation.

> power of disposition of the property. On the other hand, 'condemnation blight' relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation." 28 N.Y.2d at 255, 321 N.Y.S.2d at 357.

Focusing on pre-condemnation activities carried out by a city in an urban redevelopment area where no condemnation action had been filed against the petitioner's lands, the Supreme Judicial Court of Massachusetts in *Cayon v. City of Chicopee*, 277 N.E.2d 116, 117 (Mass. 1971) held:

> "We believe that the allegations in the petition that the respondents' actions in announcing that the petitioner's land would be taken for urban renewal purposes and in failing to execute the takings, thereby decreasing the value of his property and depriving him of the opportunity to use or sell the land or pay the taxes levied upon it, do not disclose a 'taking' for which compensation must be paid."

And in *Wilson v. City of Long Branch*, 27 N.J. 360, 142 A.2d 837, *cert. denied*, 358 U.S. 873 (1958), the Supreme Court of New Jersey applied the rule employed by the Court below:

> "In effect [plaintiffs] say that a statute is contrary to our basic law which permits a municipality to impair the value of property and restrict its use by a declaration of blight without requiring compensation for such loss. But this is not a taking in the constitutional sense." 27 N.J. at 374, 142 A.2d at 844-845.

The California Supreme Court in *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111 (1973) held that the adoption of a plan showing plaintiff's property slated for acquisition and a subsequent refusal on the part of the city to issue building permits did not constitute a "taking" of property. Distinguishing its earlier decision in *Klopping v. City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345 (1972) in which condemnation proceedings were *initiated* against the property, the court said:

> "The instant case involves entirely different circumstances. The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property.
>
> * * * * *
>
> *"In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury."* 10 Cal. 3d at 119-20.

See also Bakken v. State of Montana, 142 Mont. 166, 382 P.2d 550 (1963); and *Empire Construction, Inc. v. City of Tulsa*, 512 P.2d 119 (Okla.), *cert. denied*, 414 U.S. 1094 (1973).

The foregoing carefully considered decisions of the highest courts of the states of New York, New Jersey, Massachusetts, California, Montana and Oklahoma thus are in total accord with the decision of the Court of Appeals below.

CONCLUSION

The record below conclusively established that the legislative authority of the Respondent City never expressed an intention to appropriate Petitioner's properties for any purpose. The facts in the record showed that no preliminary legislative step was taken to even pave the way for a possible use of the eminent domain power with respect to such properties. Under such facts, the Court of Appeals correctly held that there was no "taking" of property in the constitutional sense. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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